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in the Supreme Court of the United States

OCTOBER TERM 1975

NO. 75-949

IOANA DRAGANESCU, et al,
Petitioners

vs.

FIRST NATIONAL BANK OF HOLLYWOOD,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

JACK F. WEINS, ESQUIRE
ABRAMS, ANTON, ROBBINS,
RESNICK AND SCHNEIDER, P.A.
Attorneys for Respondent
1935 Harrison Street
Hollywood, Florida 33022

MIAMI REVIEW — 371-4853 — 377-3721

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

This is the second visit of this case to this Court. This Court denied a Petition for a Writ of Certiorari (421 U.S. 929, 95 S.Ct. 1655, 1975) to the U.S. Court of Appeals for the Fifth Circuit regarding its opinion at 502 F.2d 550, (1974).

The present Petition is directed to an unreported Order of Dismissal entered by the District Court and its affirmance by the Court of Appeals, per curiam, without opinion, both of which are reprinted in full in the Petitioners' appendix.

JURISDICTION

The Petitioners attempt to invoke this Court's jurisdiction under 28 U.S.C., Section 1254 (1). The Respondent believes that this Court lacks jurisdiction because none of the well recognized grounds for granting certiorari are present.

QUESTIONS PRESENTED

I.

MAY A TRIAL JUDGE IN THE EXERCISE OF HIS DISCRETION REMOVE ONE OF THE PLAINTIFFS' ATTORNEYS PRIOR TO TRIAL WHERE THAT ATTORNEY ANNOUNCES HIS INTENTION TO BE A MATERIAL WITNESS FOR THE PLAINTIFFS AT AN ENSUING JURY TRIAL.

II.

IS IT PROPER FOR A TRIAL JUDGE TO DISMISS THE PLAINTIFFS' ACTION WHEN NONE OF THE PLAINTIFFS APPEAR, EITHER IN PERSON OR THROUGH OR WITH COUNSEL, FOR TRIAL AFTER NOTICE.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The Petitioners filed suit against the First National Bank of Hollywood, Florida, a National Banking Corporation, and a former employee for their alleged negligent failure to prepare a will. The action was filed for the Petitioners in the United States District Court for the Southern District of Florida by John R. Vintilla, Esquire, of Cleveland, Ohio. Thereafter, William E. Allison, Esquire, of St. Petersburg, Florida, filed an appearance as additional counsel for the Petitioners. After that, John Carlon, Esquire, of Fort Lauderdale, Florida, filed an appearance as further additional counsel for the Petitioners.

Pursuant to Rule 14-C of the local rules of the United States District Court for the Southern District of Florida, Mr. Carlon met with Respondent's counsel and prepared a pretrial stipulation prior to the pre-trial conference. Thereafter, Mr. Carlon appeared at the pre-trial conference on behalf of the Petitioners.

At the pre-trial conference the District Judge considered the question of whether or not Mr. Vintilla, who was listed in the pre-trial stipulation as a material witness for the Petitioners, could act as trial counsel and also be a material witness. The trial judge, in the exercise of his judicial discretion, determined that Mr. Vintilla could not be a material witness and act as trial counsel.

Thereafter, Mr. Vintilla moved, on behalf of the Petitioners, to amend the District Court Judge's pre-trial order so as to permit himself to act as trial counsel and be a material witness for the Petitioners. The District Court Judge denied this request.

On appeal, the District Court Judge's decision was unanimously affirmed. *Draganescu v. First National Bank of Hollywood*, 502 F.2d 550 (5th Cir. 1974). A Petition for Rehearing was denied. A Petition for a Writ of Certiorari was filed with this Court and was denied. 421 U.S. 929, 95 S.Ct. 1655 (1975).

Thereafter, the District Court set the case for trial and upon the failure of the Petitioners to appear at trial either in person or through or with counsel the District Court Judge dismissed the action. The Court of Appeals affirmed the dismissal of the case per curiam, without opinion. The present Petition for a Writ of Certiorari to this Court followed.

ARGUMENT

This Petition should be summarily rejected because it is nothing more than an attempt to have this Court consider the same issue raised by the Petitioners in their prior petition. After the District Court Judge entered an order precluding Mr. Vintilla from acting as both trial counsel and a material witness in a jury trial, an appeal was taken. In a unanimous opinion the District Court's order was affirmed. 502 F.2d 550 (1974). This court rejected certiorari. 421 U.S. 929, 95 S.Ct. 1655 (1975).

Thereafter the case was set for trial on the District Court's jury docket. When none of the Petitioners appeared for a duly noticed trial either in person or through or with counsel the action was dismissed. On appeal the dismissal was affirmed.

The Petitioners under the guise of seeking a review of the order of dismissal raise the same question that was raised in their prior petition to this court. This time they cite some different cases but they are directed to the same issue, namely, may a trial judge in the exercise of his discretion remove one of the Plaintiffs' attorneys prior to trial where that attorney announces his intention to be a material witness for the Plaintiffs at an ensuing jury trial.

As was noted by this Court in *French v. Hall*, 119 U.S. 152, 7 Sp.Ct. 170 (1886), it is "unseemly" for counsel in a civil action to testify for his client especially if he is in a position to comment on his own testimony, which would be the case here since the Petitioners' requested trial by jury. This Court clearly indicated that this practice should properly be discouraged.

Furthermore, it is broadly recognized that the trial judge is vested with considerable discretion in this area. *French v. Hall*, supra; *Travelers Insurance Company v. Dykes*, 395 F.2d 747 (5th Cir. 1968).

In addition, this issue has previously been decided and cannot be reargued in this Petition. The only legitimate question which can be raised in this Petition is the

District Court's dismissal of the action with prejudice when neither the Petitioners nor counsel appeared for the court's trial calendar call and the trial itself. While this is a proper issue to raise at this juncture it is one without merit. Petitioners' non-appearance for a duly noticed trial (no request for a continuance or postponement was made) is tantamount to a failure to prosecute and the District Court in such circumstances has the inherent authority to dismiss the action. *Linis v. Wabash Railroad Company*, 370 U.S. 626, 82 S.Ct. 1386 (1962); *Hyler v. Reynolds Metal Co.*, 434 F.2d 1064 (5th Cir. 1970), cert. den. 403 U.S. 912, 91 S.Ct. 2219, rehrg. den. 404 U.S. 875, 92 S.Ct. 34.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JACK F. WEINS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief was delivered by mail to JOHN R. VINTILLA, Esquire, 550 Hanna Building, Cleveland, Ohio, 44115, Attorney for Petitioners this ____ day of February, 1976.

ABRAMS, ANTON, ROBBINS,
RESNICK AND SCHNEIDER,
P.A.
Attorneys for Respondent
1935 Harrison Street
Hollywood, Florida 33022

By: _____
Jack F. Weins